United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

75-7047

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P/5

In The

United States Court of Appeals

For The Second Circuit

SAMUEL KOPET,

Appellant,

vs.

ESQUIRE REALTY COMPANY, BENJAMIN KAUFMAN, GERALD S. KAUFMAN and NATHAN P. JACOBS,

Appellees.

APPELLANT'S APPENDIX

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CIVIL DOCKET

DOCKET ENTRIES

JUDGE MacMAHON

UNITED STATES DISTRICT COURT

Jury demand date:

BY PLTFF-10-30-72

72 CIV. 4605

C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
SAMUEL LOPEZ Vs. ESQUIRE REALTY CO, BENJAMIN KAUFMAN GERALD S. KAUFMAN and NATHAN P. JACOBS.	For plaintiff: KASS, GOODKIND, WIESLER & GERSTEN 122 East 42nd St. NYC, NY 10017 (212)867-8570

UNITED STATES COURTS OF APPEALS
FILED
JAN 13 1975
DANIEL FUSARO, CLERK
SECOND CIRCUIT

T-4278

For defendant:
Herman Obrall, 1 N.Y. Plaza, NYC 10004

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.		DISB.	
J.S. 5 mailed X	Clerk		12/3/72		15			
			12/3/72	[illegible]			15	
J.S. 6 mailed	Marshal		1/8/73	[illegible]			5	
Basis of Action: SEC of 1933, Sec 10(c) SEC of 1934, Rule 10(b) 5)	Docket fee							
	Witness fees							
Action arose at:	Depositions							

JUDGE METZNER

72 CIV. 4614

DATE	PROCEEDINGS	Judgment Note
t.30,72	Filed Complaint. Issued Summons.	
ov.10,72	Filed Summons with Marshal's return. Served Esquire Realty Co. by Benjamin Kaufman, partner, on 11/6/72. Served Benjamin Kaufman on Benjamin Kaufman personally on 11/6/72. " Nathan P. Jacobs by Nathan P. Jacobs, personally on 11/6/72.	
ov.16,72	Filed Defts Stip & Order extending time to answer complaint to 12/15/72. Metzner,J.	
ec.14,72	Filed Defts Stipulation extending time to answer to 1/17/73. So Ordered. Metzner,J.	
an.17,73	Filed ANSWER, of Defts to Complaint.	
Feb.6,73	Filed Pltff's Notice of Motion for CLASS ACTION Determination and Summary Judgment.	
eb.6,73	Filed Statement pursuant to Rule 9(g) Gen. Rules Of U.S.D.C., S.D.	
eb.6,73	Filed Memorandum in support of motion for Class Action Determination and summary judgment.	
ay 22,73	Filed Defts Affdvt in opposition to Motion for Class action determination and Summary Judgment.	
ay 22,73	Filed Defts Notice of Cross - Motion.	
ay 22,73	Filed Memorandum of law in support of Defts' Motion for dismissal of Counts IV & of Complaint and in opposition to Pltff's Motion for summary judgment and for Class Determination.	
un22-73	Filed pltff's reply affdvt in support of motion for class action determination and summary judgment.	
un22-73	Filed pltff's reply memorandum of law in support of pltff's motion for summary judgment and class action determination and in opposition to defts' motion for dismissal of counts 4 & 5 of the compalint.	
ly 13-73	Filed reply memorandum of law in support of defts' motion for dismissal	
ec- 4-73	Filed OPINION #40087. for reasons indicated, defts. motion is re claims numbered 5 is granted since the claims do not arise out of the 1971 offering by the limited partners; pltff's motion for summary judgment will be granted as to claims 1 and 3 and denied as to ct. 2; pltff's motion to maintain class relief under the cts. 1, 2 and 3 is granted. As limited partners purchased pltff's partnership interest. This figure is sufficient to satisfy the numerosity of Rule 23(a) -- The order to be settled on notice shall contain the proposed notice to the class. So ordered. -- Metzner, J. m/n	
Dec-4-73	Filed memo endorsed on defts. cross-motion to dismiss cts. 4 and 5: Motion granted, see opinion #40087. So ordered. - Metzner, J. m/n	
Jun-12-74	Filed memorandum of law in support of plaintiff's application for counsel fees.	
Jun-17-74	Filed pltf's affdvt. and notice of motion for counsel fees - ret. 6-24-74	
Jul-10-74	Filed defendants memorandum of law re pltf's application for Atty's fees.	
Jul-17-74	Filed plaintiff's reply memorandum of law in support of his motion for counsel fees.	
6-25-74	PRE-TRIAL CONFERENCE HELD BY Metzner,J.	
Jul-18-74	Filed defendants' summary [illegible] Counsel is directed to [illegible] necessary order on the original motion. So ordered.	
[illegible]	Filed plaintiff's [illegible] for the 2nd Circuit from order [illegible]	

SUMMONS (Filed November 10, 1972) 3a

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

Judge Metzner

CIVIL ACTION FILE NO. 72 Civ 4605

SAMUEL KOPET,

Plaintiff

v.

ESQUIRE REALTY COMPANY, BENJAMIN KAUFMAN, GERALD S. KAUFMAN and NATHAN P. JACOBS,

Defendants

SUMMONS

To the above named Defendants :

You are hereby summoned and required to serve upon

KASS, GOODKIND, WECHSLER & GERSTEIN,

plaintiff's attorneys, whose address is

122 East 42nd Street, New York, New York 10017

an answer to the complaint which is herewith served upon you, within ten days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

John Livingston
Clerk of Court.

Is/ E A. Becker
Deputy Clerk.

Date: October 30, 1972

[Seal of Court]

COMPLAINT (CLASS ACTION) (Filed October 30, 1972)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAMUEL KOPET, Plaintiff, -against- ESQUIRE REALTY COMPANY, BENJAMIN KAUFMAN, GERALD S. KAUFMAN and NATHAN P. JACOBS, Defendants.	COMPLAINT CLASS ACTION PLAINTIFF DEMANDS TRIAL BY JURY Index No. 72 Civ 4605 (CLM)

Plaintiff, by his attorneys, Kass, Goodkind, Wechsler & Gerstein, alleges the following upon information and belief, except Paragraph 3 which is alleged upon knowledge.

1. (a) The jurisdiction of this Court is based upon Section 22 of the Securities Act of 1933, as amended ("Securities Act"), Section 27 of the Securities Exchange Act of 1934, as amended ("Exchange Act"), and the principles of pendent jurisdiction.

(b) This action arises under Sections 5, 12 and 17 of the Securities Act, Section 10(b) of the Exchange Act, Rule 10(b)5 promulgated thereunder, Section 352e of the General Business Law of the State of New York and Section 99 of the Partnership Law of the State of New York.

2. Class Action allegations:

(a) A class action is alleged pursuant to Rule 23(b)(3), F.R.C.P.

(b) The class consists of (a) all of the limited

partners of the Esquire Realty Company ("Esquire") who purchased additional Limited Partnership Interests (the "Securities") pursuant to a letter dated November 1, 1971, a copy of which is attached hereto as Exhibit "A", and (b) all past and present holders of the Securities and the Limited Partnership Interests issued pursuant to a Prospectus dated August 2, 1962 (the "Participations").

(c) Plaintiff is a member of said class; his claims are typical of the claims of all class members. He can fairly and adequately protect the interests of the class.

(d) The common questions of fact include: Whether the defendants made an offer to sell securities without an effective registration statement with respect to such securities, whether defendants violated Sections 5, 12 and 17 of the Securities Act, Section 10(b) of the Exchange Act, Rule 10(b)5 promulgated thereunder, Section 352e of the General Business Law of the State of New York with respect to the members of subclass (a) and whether defendants have failed to provide the members of subclass (b) with certified financial statements as required by the partnership agreement.

(e) The common questions of law include: The liability of the defendants to members of subclass (a) by reason of the securities laws and the General Business Law of the State of New York and to members of subclass (b) by reason of Section 99 of the Partnership Law of the State of New York and the Partnership Agreement dated April 30, 1962 (the "Agreement")

(f) The class consists of in excess of 400 persons; the precise number cannot be ascertained at this time. Joinder of all class members is impracticable.

(g) The questions of law and fact common to the members of the class predominate over any questions affecting individual members.

(h) The class action is superior to other available methods for the fair and efficient adjudication of the controversy.

3. Plaintiff purchased $15,000 of Participations of Esquire on or about August 2, 1962 and is still the owner of such partnership interests. In addition, plaintiff purchased $1,250 of the Securities on or about November 6, 1972.

4. Plaintiff brings this action on his own behalf and representatively on behalf of all persons described in Paragraph 2(b) hereof.

5. (a) Defendant Esquire is a limited partnership organized under the laws of the State of New York on April 30, 1962 for the purpose of acquiring the fee interest in the Esquire building in Chicago and a tract of land in Lodi, New Jersey on which there is standing a self-service discount department store. The leasing of these properties constitutes the entire business of Esquire. Esquire maintains its principal place of business in the City, County and State of New York.

(b) Defendant Nathan P. Jacobs resides at 71 Wellington Avenue, City of New Rochelle, County of Westchester.

(c) Defendant Benjamin Kaufman resides at 1056 Fifth Avenue, City, County and State of New York.

(d) Defendant Gerald S. Kaufman resides at 110 East 87th Street, City, County and State of New York.

(e) Defendants Benjamin Kaufman, Gerald S. Kaufman and Nathan P. Jacobs are three of the general partners of Esquire, were instrumental in the formation of Esquire, and by reason of their position as general partners are in control of Esquire.

COUNT I

6. On November 1, 1971, Esquire sent a letter to each member of the class which stated in pertinent part:

> "Your General Partners by this letter, offer to you and each of the other Limited Partners of the Esquire Realty Company the opportunity to invest your pro rata share of the $200,000 as additional partnership capital. If you participate in this investment, your income pursuant to the Partnership Agreement shall be increased by a sum which on an annual basis will be equivalent to 9-1/2% of your additional capital investment. If you, or any of the other Limited Partners, do not desire to make such additional investment, the General Partners agree to invest the difference between the additional capital so contributed by the Limited Partners as a result of this letter and the required sum of $200,000.

7. No prospectus or information of any kind other than that contained in the letter dated November 1, 1971 accompanied said letter. Neither was there any registration statement in effect with respect to such securities.

8. In connection with the transaction described above, the defendants have unlawfully, directly or indirectly, without a registration statement in effect as to the securities:

(a) Made use of the mails and means and instrumentalities of interstate commerce to sell such securities through the use or medium of any prospectus or otherwise;

(b) Carried or caused to be carried through the mails and instrumentalities of interstate commerce such securities for the purpose of sale or for delivery after sale;

(c) Carried or caused to be carried through the mails and in interstate commerce such securities for the purpose of sale or for delivery after sale unaccompanied by a prospectus that met the requirements of subsection (a) of Section 10 of the Securities Act;

(d) Made use of the mails and instrumentalities of interstate commerce to offer to sell such securities for which no registration statement had been filed.

9. By reason of the foregoing, defendants have violated Sections 5 and 12 of the Securities Act and the plaintiff and the class he represents have been damaged.

COUNT II

10. Plaintiff repeats and realleges all the foregoing

paragraphs of this complaint as if herein set forth at length.

11. The aforesaid letter was materially false and misleading. It failed to disclose that the interest of those members of the class who did not participate in the offering of the additional $200,000 of securities would be diluted. Neither was any information of any kind relating to the value of the underlying real estate or the interest of the partnership in the underlying real estate furnished. As a result of the failure by Esquire to furnish any information concerning the additional offering, the limited partners did not have information on the basis of which an investment decision could be made.

12. By reason of the foregoing, defendants have, directly and indirectly, by use of the mails and of the means and instrumentalities of interstate commerce:

(a) Employed devices, schemes and artifices to defraud;

(b) Made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading; and

(c) Engaged in acts, practices and the courses of business which operated and would operate as a fraud.

13. By reason of the foregoing, defendants have violated Section 17 of the Securities Act, Section 10(b) of the

Exchange Act and Rule 10(b)(5) promulgated thereunder, whereb plaintiff and the class he represents have been damaged.

COUNT III

14. Plaintiff repeats and realleges all the foregoi paragraphs of this complaint with the same effect as if herei set forth at length.

15. By reason of the foregoing, defendants have mad a public offering and sale in and from the State of New York securities constituted of limited partnership interests witho there having been filed with the Department of Law of the Sta of New York prior to such offering, a written statement or statements concerning the contemplated offering in violation Section 352e of the General Business Law of the State of New York, whereby plaintiff and the class he represents have been damaged.

COUNT IV

16. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 5 hereof as if t same had been set forth at length.

17. The prospectus dated August 2, 1962 provides in pertinent part that: "The partnership will provide annual reports including a balance sheet and profit and loss stateme certified by an independent certified public accountant."

18. No such annual reports, certified or otherwise, have ever been provided to any members of the class, whereby

defendants have violated the Agreement and plaintiff and the class he represents have been damaged.

COUNT V

19. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 5, 17 and 18 hereof as if the same had been set forth herein at length.

20. Defendants have failed and still fail to account fully to the class for the profits of Esquire in violation of Section 99 of the Partnership Law of the State of New York.

21. Plaintiff does not know and cannot ascertain without an accounting by the defendants what money and property have been received by the defendants in connection with Esquire, what money has been paid and disbursed and for what purposes, and what money and other property now remain in the possession of the defendants to which the members of the class are entitled to their pro rata share.

WHEREFORE, plaintiff prays for judgment:

(a) rescinding the offering to the limited partners;

(b) permanently enjoining the defendants from further violations of the Securities Act, the Exchange Act and Section 352e of the General Business Law of the State of New York;

(c) requiring that an accounting be had between defendants and the class of the acts and doings of

the defendants and of the monies and other properties received, sold and disbursed by defendants in connection with Esquire.

(d) requiring defendants to pay to plaintiff and the class he represents a sum equal to the damages they have sustained;

(e) awarding plaintiff the reasonable costs of this action including reasonable counsel and accounting fees; and

(f) granting such other and further relief as the Court may deem proper.

KASS, GOODKIND, WECHSLER & GERSTEIN

By _____

A Member of the Firm
Attorneys for Plaintiff
122 East 42nd Street
New York, New York 10017
(212) 867-8570

OREGON 9-8350

SUITE 1001

OFFICE OF THE UNDERSIGNED
10 EAST 40TH STREET
NEW YORK, N. Y. 10016

November 1, 1971

RE: ESQUIRE REALTY COMPANY

Dear Investor:

On November 24, 1971, the existing mortgage balance of approximately $200,000.00 on the Lodi Shopping Center, known as Modells Shoppers World, shall become due and payable. It is the obligation of the Esquire Realty Company, the owners of the Lodi Shopping Center, to pay such balance.

In 1974, the first mortgage on the Esquire Building in Chicago, Illinois (which is also owned by the Esquire Realty Company) shall become due. Your General Partners feel that, at that time, with both properties free and clear of any mortgages, the most favorable refinancing possibilities shall be available to the Company. Therefore, the General Partners have decided that the Company will satisfy the mortgage balance with additional capital to be invested in the Company in the following manner.

> Your General Partners by this letter, offer to you and each of the other Limited Partners of the Esquire Realty Company the opportunity to invest your pro rata share of the $200,000.00, as additional partnership capital. If you participate in this investment, your income pursuant to the Partnership Agreement shall be increased by a sum which on an annual basis will be equivalent to 9-1/2% of your additional capital investment. If you, or any of the other Limited Partners, do not desire to make such additional investment, the General Partners agree to invest the difference between the additional capital so contributed by the Limited Partners as a result of this letter and the required sum of $200,000.00.

Very truly yours,

ESQUIRE REALTY COMPANY

By _____
Benjamin Kaufman
General Partner

mw

OFFICE OF THE UNDERSIGNED
10 EAST 40TH STREET
NEW YORK, N. Y. 10016

Instructions:

If you desire to participate as aforesaid to the extent of the investment set forth at the foot of this letter, kindly sign your name in the space indicated below and return your signed copy of this letter together with your check in the enclosed, stamped and self-addressed envelope, by no later than November 15, 1971. You may retain one copy of this letter for your records. If we do not receive your check by November 15, 1971, then and in that event, it shall be assumed that you do not wish to participate.

THE UNDERSIGNED accepts the offer above made and encloses herewith his check to the order of ESQUIRE REALTY COMPANY in the sum of $125.00

(Sign here if you wish to participate

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - x

SAMUEL KOPET,

Plaintiff,

-against-

ESQUIRE REALTY COMPANY, BENJAMIN KAUFMAN, GERALD S. KAUFMAN and NATHAN P. JACOBS,

Defendants.

- - - - - - - - - - - - - - - - - x

72 Civ. 4605

ANSWER OF DEFENDANTS ESQUIRE REALTY COMPANY, BENJAMIN KAUFMAN, GERALD S. KAUFMAN and NATHAN P. JACOBS

Defendants Esquire Realty Company, Benjamin Kaufman, Gerald S. Kaufman and Nathan P. Jacobs answering the complaint herein:

1. Deny the allegations of paragraphs "1" and "2".

2. Deny the allegations of paragraph "3" except defendants admit that at one time plaintiff was the owner of a $15,000 participation as a limited partner of Esquire Realty Company. Defendants lack sufficient knowledge to form a belief as to whether plaintiff is still the owner of such participation.

3. Admit the allegations of paragraph "5" except that defendants Nathan P. Jacobs and Gerald Kaufman deny they reside at the addresses alleged in subparagraphs (b) and (c), respectively.

IN ANSWER TO COUNT I

4. Deny the allegations of paragraph "8" and "9".

IN ANSWER TO COUNT II

5. Deny the allegations of paragraphs "10" through "13".

IN ANSWER TO COUNT III

6. Deny the allegations of paragraphs "14" and "15".

IN ANSWER TO COUNT IV

7. Deny the allegations of "16" and "18".

IN ANSWER TO COUNT V

8. Deny the allegations of paragraphs "19" through "21".

AS AND FOR AFFIRMATIVE DEFENSES

FIRST. Plaintiff will not and cannot fairly and adequately represent and protect the class alleged in paragraph "2" and his alleged claim is not typical of the claims, if any, of the class.

SECOND. Counts I and II fail to state a claim upon which relief of any kind can be granted against defendants.

THIRD. The court lacks jurisdiction of the claims asserted in Counts III, IV and V by plaintiff class because the amount actually in controversy is less than ten thousand dollars, exclusive of interest and costs, and because plaintiff and defendants are citizens of the same state.

FOURTH. The members of the class under Counts III, IV and V having alleged claims, if any, that meet the jurisdictional requirements as to dollar amount and diversity of citizenship are not so numerous as to make joinder of all members impracticable.

Herman Odell

HERMAN ODELL
One New York Plaza
New York, New York 10004
483-1727
Attorney of Record for Defendants
Esquire Realty, Benjamin
Kaufman, Gerald S. Kaufman and
Nathan P. Jacobs

Nathan M. Sokolski

10 E. 40th Street
New York, New York 10016

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OPINION Copy

18a

OPINION OF METZNER, D.J. DATED DECEMBER 4, 1973

1434-A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAMUEL KOPET,

Plaintiff,

-against-

ESQUIRE REALTY COMPANY, BENJAMIN KAUFMAN, CLIFFORD S. KAUFMAN and NATHAN P. JACOBS,

Defendants.

40087

72 Civ. 4503

FILED
U.S. DISTRICT COURT
S.D. OF N.Y.
DEC 4 1 25 PM 1

Metzner, Dist Judge
METZNER, D. J.:

Plaintiff has moved for an order pursuant to Fed. R. Civ. P. Rule 23(c) declaring this a class action, and pursuant to Rule 56 for summary judgment. Defendants have cross-moved for an order dismissing Counts Four and Five for lack of subject matter jurisdiction.

Plaintiff is a limited partner of defendant Esquire Realty Company (Esquire), a typical real estate syndication venture. The individual defendants are the general partners in Esquire. The properties owned by Esquire were acquired with the proceeds of a $2,185,000 public offering in 1962. Plaintiff purchased a $15,000

interest pursuant to this public offering and is still the owner of such interest.

The principal controversy in the instant case arises out of a refinancing of the mortgage of a New Jersey property. On November 1, 1971, Esquire sent a letter to each of the limited partners offering them the opportunity to participate in the refinancing of the mortgage. In response to this letter, 100 limited partners, including plaintiff, purchased additional interests totalling $131,250. No registration statement for the sale of these additional interests was ever filed with the Securities and Exchange Commission (SEC), or the Department of Law of the State of New York. This failure to register is the basis for the allegations contained in Counts I, II and III of the complaint. The causes of action embraced in these counts are being brought as a class action on behalf of those limited partners of Esquire who purchased interests pursuant to the November 1, 1971 letter.

Count I charges defendants with violations of Sections 5 and 12(1) of the Securities Act of 1933 (15 U.S.C. §§ 77(e), (1)(1)), for offering and selling the additional partnership interests without a registration statement.

Count II charges a violation of Section 17 of the 1933 Act (15 U.S.C. § 77(q) and Section 10b of the Securities Exchange Act of 1934 and Rule 10b-5 promulgates thereunder (15 U.S.C. § 78j(j)). on the ground that the letter sent to the limited partners was false and misleading.

Count III is brought under the doctrine of pendent jurisdiction and charges the defendants with a violation of Section 352-c of the New York General Business Law by failing to file a prospectus with the New York Department of Law in connection with the 1971 offer.

Counts IV and V of the complaint involve claims unrelated to the transaction which is the subject matter of the first three counts. It is brought as a class action. However, the putative members of this class are different from those sought to be represented in the first group. Count IV charges defendants with a violation of the partnership agreement by failing to provide annual certified reports to the limited partners. Count V alleges that defendants have failed to make a full accounting to the class for the profits of Esquire in violation of Section 99 of the N.Y. Partnership

Law.

Law. Both of these claims are state claims and plaintiff seeks to have them adjudicated under the principle of pendent jurisdiction.

Plaintiff seeks a judgment (a) rescinding the offering to the limited partners of November, 1971; (b) permanently enjoining defendants from further violations of the federal and state securities laws; (c) requiring an accounting by defendants of all moneys and other properties received, sold and disbursed by Equire; and (d) requiring the payment of damages.

Our initial attention must be directed to defendants' motion to dismiss Counts IV and V on the ground that they are not properly before the court under the doctrine of pendent jurisdiction. Defendants admit that Count XXX is properly before the court as a matter of pendent jurisdiction. The most recent Supreme Court pronouncement on the scope of pendent power is found in United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966). Under Gibbs, power to hear a pendent claim exists when there is a federal claim:

> "[A]nd the relationship between that claim and the state claim permits the conclusion that the entire action before the

> court comprises but one constitutional 'case.' . . . The state and federal claims must derive from a common nucleus of operative facts." 383 U.S. at 725.

Courts have generally found that the power to hear a pendent claim exists when the pendent claim arises out of the same transaction or occurrence. See generally, Note, "Hum v. Gibbs and Pendent Jurisdiction," 41 Miss. L. Rev. 667-72 (1969).

The claims proffered in Counts IV and V are a direct outgrowth of the 1971 offering to the limited partners. They relate back to the formation of Dominic in 1952 and the conduct of its business from that date up to and including today. Under no reasonable reading of Gibbs are these claims pendent to Counts I and II. Consequently, they must be dismissed.

We turn next to plaintiff's motion for a determination that he may maintain his claim to relief under Counts I, II and III as a class action. 103 limited partners purchased additional partnership interests pursuant to the 1971 letter. This figure is sufficient to satisfy the numerosity requirement of Rule 23(a). Eisenberg Corp. v. [illegible] 393 F. Supp 293 F. Supp. 164, 170 (S.D.N.Y. 1970).

It is also clear that there are questions of law or fact common to the class. Count I alleges a series of misrepresentations and omissions which were violative of the federal securities laws. In addition, each of the members of the class received the same offering letter which contained these omissions and misrepresentations, and each purchased unregistered "securities" pursuant to that letter. See, Mersay v. First Republic Corp., 43 F.R.D. 465 (S.D.N.Y. 1968).

Defendants urge that despite the existence of these common issues as to liability, Kopet's claims are antagonistic in another area to those of the other limited partners who bought additional shares. The prayer for relief seeks rescission, damages and an injunction. Since Count I relies on Section 12(1), a purchaser who still owns the security may only obtain rescission, while one who has sold the security may be compensated by damages. III Loss, Securities Regulation at 1721 (1961). Plaintiff still retains the interest he purchased.

It appears to the court that the possibility of different types of relief flowing from a common source of liability should not defeat class action procedure.

With a maximum of 135 members of the class, a judgment can easily be fashioned to afford the proper relief to portion who do not opt out.

It is clear that the class action in this litigation is superior to other available methods for the adjudication of the controversy, and that the representative party will fairly and adequately repre[illegible] the interest of the class.

Coming now to plaintiff's motion for summary judgment, as far as the first claim is concerned, defendants have admitted that they offered securities by use of the mails without having a registration statement in effect. Liability is thus established under Section 12(1), and summary judgment will be granted to plaintiff on Count I.

Likewise, defendants have admitted liability on Count III for violation of Section 352 of the New York General Business Law. Therefore, summary judgment will be granted on Count III.

Plaintiff alleges in Count II that the 1971 letter sent to the limited partners was materially false and misleading because (1) it failed to disclose that

the interest of those members of the class who did not participate in the offering could be diluted, and (2) it failed to furnish any information relating to the value of the underlying real estate or the interest of the [illegible] in the underlying real estate. As a result of these non-disclosures, it is claimed that the "limited partners did not have information on the basis of which an investment decision could be made."

Count II charges the defendants with violating both Section 17(a) of the 1933 Act and Section 10(b) of the 1934 Act and Rule 10b-5. Whether Section 17(a) will support a private cause of action is still unresolved in this circuit. In most instances, actions brought by buyers under both of these sections are simply treated as being brought under Section 10(b) since the proof for establishing liability is the same under either section. See, Lanza v. Drexel & Co., 479 F.2d 1277, 1290, n. 2 (2d Cir. 1973) (en banc); [illegible] SEC v. TGS [illegible] 401 F.2d [illegible] $231,867 [illegible] (2d Cir. 1969) (certiorari denied); Pearlman v. Cannaro, CCH Fed. Sec. Reg. Rep. ¶ 94,006 at 94,053 [illegible] Sec. Reg. Rep. ¶

(S.D.N.Y. May 31, 1973); Dorfman v. First Boston Corp., 336 F. Supp. 1089 (E.D.Pa. 1972). We shall do the same.

Defendants oppose the granting of summary judgment on this count because they say there is a material issue of fact as to whether plaintiff has suffered any damage for these alleged nondisclosures. Defendants claim that no damage has been suffered because the partnership interests involved have actually appreciated in value since the sale in 1971. Plaintiff only makes the bare allegation that he has "suffered damages." Since defendants' liability "hinges upon whether there are recoverable damages," and there is an issue of fact as to that matter, summary judgment must be denied. 6 Moore, Federal Practice ¶ 56.7(16) at 2529; see also, Lindgren, Inc. v. Goodman, CCH Sec. Rep. Rep. ¶ 94,601 (N.D. Ill., March 23, 1973); Lewis v. Dorfman, 337 F. Supp. 331, 337 (S.D.N.Y. 1972); cf., Herzfeld v. Schectman, 450 F.2d 1337, 1340 (2d Cir. 1971), cert. denied, 405 U.S. 1056 (1972).

In addition, there are issues of fact as to the materiality of the alleged nondisclosures, as well as defendants' scienter, which render summary judgment

inapplicable. Republic Technology Fund, Inc. v. Thy Mechol Corp., 482 F.2d 540, 551 (2d Cir. 1973); Lynch v. Dremel Mfg. Co., supra at 1303-1306; Hall v. Coburn Corp., CCH Sec. Fed. Rep. ¶ 94,170 at 94,973 (S.D.N.Y. Oct. 5, 1973).

The motions are disposed of as indicated above. The order to be settled on notice shall contain the proposed notice to the class.

So ordered.

Dated: New York, N. Y.
December 6, 1973

CHARLES H. TENNEY
U. S. D. J.

NOTICE OF MOTION FOR COUNSEL FEES (Dated June 12, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAMUEL KOPET,

Plaintiff,

72 Civ. 4605 (C.M.M.)

-against-

NOTICE OF MOTION FOR COUNSEL FEES

ESQUIRE REALTY COMPANY, BENJAMIN KAUFMAN, GERALD S. KAUFMAN and NATHAN P. JACOBS,

Defendants.

S I R :

PLEASE TAKE NOTICE that upon the affidavit of DAVID M. GERSTEIN, sworn to June 11, 1974, and the prior proceedings and papers filed in this action, the undersigned will move this Court at a Motion Term thereof to be held in Room 110, United States Court House, Foley Square, New York, New York 10007, on June 24, 1974, at 10:00 a.m., or as soon thereafter as counsel can be heard, for an order.

(a) awarding plaintiff counsel fees in the sum of $25,000. plus disbursements of $331.41; and

(b) directing defendants Benjamin Kaufman and Nathan P. Jacobs or, in the alternative, defendant Esquire Realty Company to pay said counsel fees and disbursements.

PLEASE TAKE FURTHER NOTICE, that you are required to serve opposing papers upon the undersigned within the time limit specified by the Rules of this Court.

Dated: New York, New York
June 12, 1974

Yours, etc.

KASS, GOODKIND, WECHSLER
& GERSTEIN

By Michael S. Fuchs
A Member of the Firm
Attorneys for Plaintiff
122 East 42nd Street
New York, N.Y. 10017
(212) 867-8570

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAMUEL KOPET, Plaintiff,	:	72 Civ 4605 (C.M.M.)
-against-	:	AFFIDAVIT SUBMITTED IN SUPPORT OF PLAINTIFF'S APPLICATION FOR LEGAL FEES.
ESQUIRE REALTY COMPANY, BENJAMIN KAUFMAN, GERALD S. KAUFMAN and NATHAN P. JACOBS, Defendants.	:	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DAVID M. GERSTEIN, being duly sworn, deposes and says:

1. I am a member of the firm of Kass, Goodkind, Wechsler & Gerstein, ("plaintiff's law firm") attorneys for the plaintiff in this class action. Stuart Wechsler, another member of the firm and I have been the partners in charge of this litigation since its inception in October of 1972. I am fully familiar with the facts set forth in this affidavit.

Nature of the Motion

2. This affidavit is submitted in support of plaintiff's motion for an order awarding counsel fees to plaintiff in the sum of $25,000.00 (plus disbursements in the sum of $331.41, itemized in Exhibit "I" hereto) to be paid by the individual defendants herein or, alternatively, to be paid by defendant Esquire Realty Company ("Esquire").

Nature of the Action

3. This action was brought on behalf of plaintiff and all limited partners of Esquire similarly situated in an effort

to remedy two breaches of duty on the part of the defendant general partners as follows:

(a) The defendant general partners, acting on behalf of Esquire, sent a letter dated November 1, 1971 (the "Letter"), to all of the then existing limited partners of Esquire, which offered an additional $200,000 worth of limited partnership interests. This offering was a public offering made without any effective registration statement or prospectus. Limited partners of Esquire purchased an aggregate of $131,250 of additional limited partnership interests as a result of such offering.

(b) The Limited Partnership Agreement of Esquire and the original Prospectus of Esquire which was distributed in connection with its 1962 public offering of limited partnership interests required that an annual financial report, certified by an independent certified public accountant, be furnished to each limited partner. Despite such requirement, the general partners of Esquire had never sent any certified financial statements to the limited partners who were kept in the dark with respect to the financial affairs of Esquire.

4. The following is a more detailed description of the counts of the complaint herein:

(a) Count I of the complaint charged defendants with violating Sections 5 and 12 of the Securities Act of 1933 (the "33 Act") by selling and offering to sell, by means of the Letter, $200,000 of additional limited partnership interests in Esquire without an effective registration statement.

this action improves the value of their investment in Esquire

(b) Count II charged defendants with violating Section 10(b) of the Securities Exchange Act of 1934 (the "34 Act") and Rule 10b-5 promulgated thereunder and Section 17 of the 33 Act by selling and offering to sell the securities by means of the Letter which contained untrue statements of fact and omitted to state material facts necessary to make the statements made not misleading.

(c) Count III charged defendants with making a public offering and sale of securities in the State of New York without first filing with the Department of Law of the State of New York, as required by Section 352e of the New York State General Business Law.

(d) Count IV charged defendants with failing to provide annual certified financial statements to the limited partners.

(e) Count V sought an accounting of the profits realized and expenditures made by Esquire.

Results Achieved and Benefits Realized

Failure to Account

5. Prior to this action, the defendant general partners had managed and controlled Esquire as if it were a private fiefdom. From the time of its organization, in 1962, they had supplied negligible information to the limited partner investors. Despite the fact that the Limited Partnership Agreement and the Esquire Prospectus required that each limited partner be furnished with a financial statement on an annual basis, certified by independent public accountants, such statements ha' never been furnished. An essential fact concealed was that defendants

Benjamin Kaufman and Nathan Jacobs had borrowed tens of thousands of dollars from Esquire between 1962 and 1972. In addition, prior to the public offering of November 1, 1971, adjudicated in this action to be in violation of Sections 5 and 12 of the 33 Act, defendants Kaufman and Jacobs caused a substantially identical public offering to be made of additional limited partnership interests in Esquire without the filing of a registration statement or distribution of a prospectus. In other words, prior to this action, the defendant general partners had wholly disregarded the contractual and statutory rights of the limited partners.

6. The only information revealed to the limited partners during the entire period from 1962 until October 30, 1972, when this action was commenced, was contained in annual skeletal balance sheets and statements of profit and loss, which were unaudited, without footnotes and in such a form as to convey minimal information and conceal essential facts.

7. The fact that defendants Benjamin Kaufman and Nathan P. Jacobs had borrowed thousands of dollars from Esquire had not been previously disclosed to or known by any of the limited partners. As the result of this action, such fact was revealed in the following manner: On February 5, 1973, plaintiff moved for summary judgment. The moving affidavit of Stuart D. Wechsler, sworn to February 5, 1973, stated that although the Esquire Limited Partnership Agreement had required the general partners to provide the limited partners with certified financial reports, such reports had never been furnished. To defend against that motion, defendants submitted an affidavit of defendant

Benjamin Kaufman dated May 21, 1973 and filed with this Court, as exhibits, copies of certified financial statements for the two years ended December 31, 1970 and December 31, 1971. The submission of such financial statements constituted the first time that any certified financial statements relating to Esquire had ever been made public. Such financial statements had never previously been sent to or seen by the limited partners and, in fact, had never even been previously prepared or available for inspection by anyone, despite a claim by Mr. Kaufman in his affidavit that such financial statements had always been available for inspection. The opinion letters of the accountants who had prepared those financial statements and which accompanied those statements were dated May 18, 1973 and May 21, 1973, respectively, only five and three days respectively before the return date of plaintiff's motion for summary judgment. Although Mr. Kaufman claimed that such statements had always been available for inspection, it would have been impossible to inspect 1970 and 1971 financial statements which had not been prepared until May of 1973. Such facts evidence that the audited financial statements for those years were prepared solely because of the bringing of this action. Copies of such financial statements and opinion letters were previously submitted to this Court in connection with said motion.

8. A reading of page 8 of Mr. Kaufman's affidavit of May 21, 1973 reveals the following additional statements:

"The audited statements for the years 1963 through 1971 are being Xeroxed and copies thereof will be given to the attorneys for plaintiff on May 22, 1973.

"The 1972 audited statement will be given to plaintiff's attorneys within two (2) weeks from the date hereof."

On June 5, 1973, Nathaniel M. Sokolski, one of the defendants' attorneys, delivered to this Court the certified financial statements referred to in Mr. Kaufman's affidavit. A copy of the letter of Mr. Sokolski, dated May 23, 1973, accompanying said statements is annexed hereto as Exhibit "A". On June 5, 1973, Mr. Sokolski delivered to this Court a certified financial statement for the year 1972. A copy of his letter of June 5, 1973 which accompanied the statement is annexed hereto as Exhibit "B".

9. In addition, in June of 1973, the 1972 certified statement was sent to all limited partners of Esquire. This was the first time in the history of Esquire that this had ever been done!

All of the above financial statements are also presently on file with this Court.

In other words, solely as the result of the bringing of this action, all of the limited partners of Esquire received a financial statement for the fiscal year ended December 31, 1972 and plaintiff's attorneys, as the de facto representative of the limited partners, were able to obtain certified financial statements for all other years since the inception of the limited partnership.

10. In April of 1974, the defendant general partners also sent a certified financial statement for the 1973 year, further evidence of the benefits achieved by this action.

11. A reading of the certified financial statements submitted to this Court suffices, without more, to show why the defendant general partners had kept the limited partners in the

dark. Schedule 11 of each statement reveals the extensive borrowings by defendants Kaufman and Jacobs. The following table, taken from such certified financial statements, sets forth the amounts of the borrowings, repayments and balances owing for each year:

As of December 31	Balance receivable at beginning of period	Borrowings	Repayments	Closing balance
1962	($200,277.75)	$252,215.80	None	$ 51,938.05
1963	51,938.05	Not available	$ 7,849.45	44,688.50
1964	44,688.50	None	None	44,688.50
1965	44,688.50	None	1,072.91	43,615.59
1966	43,615.59	None	1,500.00	42,115.59
1967	42,115.59	75,000.00	40,000.00	77,115.59
1968	77,115.59	None	20,000.00	57,115.59
1969	57,115.59	80,000.00	63,000.00	74,115.59
1970	74,115.59	70,000.00	70,000.00	74,115.59
1971	74,115.59	195,000.00	185,000.00	84,115.59
1972	84,115.59	65,000.00	20,000.00	129,115.59

The above table clearly evidences that defendants Kaufman and Jacobs had been using Esquire as their private bank from which borrowings could be made without prior approval, without any interest or security and without disclosure to any of the limited partners.

12. Furthermore, tucked away at note 6 of the financial statement for the fiscal year ended December 31, 1972 was the vital fact that the general partners had contracted to sell Esquire's principal asset, its leasehold interest in the Esquire Building in Chicago. A copy of the page containing that note is

annexed as Exhibit "C" . The limited partners had never previously been advised of this fact and were completely unaware of it. The note indicates that $910,000 was received by the general partners as a deposit on account (which has never been accounted for); that a closing would not take place for 5 years and that, in the interim, the net lease rent on the Building was to be reduced by 25%. To date there has still been no description of the transaction by the general partners. Nevertheless, solely as a result of this action, the limited partners were able to discover the existence of such transaction and, thereby, to take such further action as was required to protect Esquire and their interests in Esquire.

13. As a result of the facts revealed by the above described certified financial statements a great deal of the relief sought by Counts IV and V of the complaint, though dismissed on jurisdictional grounds, has been obtained.

14. The revelation of the illegal borrowings and the leasehold sale described above supplied the limited partners of Esquire with information sufficient to enable them to commence an action in the Supreme Court of the State of New York, New York County, on behalf of Esquire against the defendant general partners seeking, inter alia, repayment of the outstanding amount of the loans, interest on all borrowings over the 10 year period involved, payment to Esquire of all profits realized by the general partners from their use of borrowed funds and a complete accounting concerning the leasehold sale.

15. It is certain that without the "watchdog" function that plaintiff's law firm has performed in this matter, the limited partners would still be unaware of such illegal borrowings, the sale of Esquire's leasehold interest and of the financial condition of Esquire.

16. In causing disclosure of these matters, all limited partners, not just members of the specific class who purchased securities in 1971, have been significantly benefited. Furthermore, all such limited partners have significantly benefited from the fact that for the first time since Esquire's formation in 1962, the general partners were put on notice that representatives of the limited partners were carefully watching them and will continue to do so. No longer can the general partners operate on the private fiefdom theory as they had in the past.

Securities Laws Violations

17. With respect to the Counts based on securities laws violations, after oral argument on December 4, 1973, this Court decided that this action could be maintained as a class action and granted summary judgment on Counts I and III. Following that decision, we suggested to the Court that Count II be discontinued in light of the fact that summary judgment on Counts I and III would yield substantially the relief which could have been obtained under Count II.

18. As a result of the granting of summary judgment on Counts I and III, the Court decided that each limited partner who had purchased an additional limited partnership interest in the 1971 offering was entitled to rescission.

19. Naturally, the order requiring rescission benefits the individual members of the class who opt for rescission. However, a great benefit in this regard is conferred on all limited partners since the effect of the judgment in this action will be to let the defendant general partners know that the limited partners will no longer tolerate violations of the securities laws in the operation of Esquire.

20. The importance of this for the limited partners and Esquire itself cannot be overestimated since the violation complained of in Counts I, II and III of the complaint was not the first such violation on the part of the defendant general partners. On at least two prior occasions, the defendant general partners herein committed the identical violation (i.e. the issuance of securities in a public offering without the filing of a registration statement). Such other violations were as follows:

(a) In 1968, the defendant general partners herein caused Esquire to offer additional limited partnership interests to all limited partners and did actually sell such additional partnership interests without filing a registration statement or distributing a prospectus. A copy of the letter dated November 20, 1968, by which that illegal offering was made is annexed hereto as Exhibit "D".

(b) In 1970, the same persons, as general partners of the Sherman Company, a New York limited partnership which owned the Sherman House Hotel in Chicago, made a public offering of securities to more than 700 limited partners pursuant to a letter dated May 29, 1970 and without the filing of a registration statement or the distribution of any prospectus at

all. A copy of the letter sent by such defendant general partners in connection with the Sherman Hotel is annexed hereto as Exhibit "E" . Many of the limited partners of the Esquire company are also limited partners of the Sherman Company. Plaintiff in this action is one such person and is fully aware of the above facts.

21. In view of the fact that a limited partner must be a "purchaser" in order to have standing under the Birnbaum Rule to remedy such an illegal offering, limited partners who do not purchase because they have no facts on which to base an investment decision, are diluted without remedy. This is what did happen in 1968 when the previous illegal offering was made by the defendant general partners on behalf of Esquire. At that time, no limited partner, who purchased, acted to remedy the violation. It was only after the second illegal offering in 1971, which was the subject of this action, that plaintiff, as a limited partner, decided to act in behalf of his fellow limited partners to stop these abuses of trust and violations of law.

22. Had this lawsuit not been commenced, prosecuted and brought to a successful conclusion, there would have been no deterrent to continuing future violations of the securities laws by the defendant general partners. As a result of this action, they now know that future such violations will not be tolerated. All limited partners benefit significantly from this.

Importance of this Case

23. The importance of this case is evidenced from the fact that after the decision of this Court dated December 4, 1973, an article describing the decision appeared on the first page of the New York Law Journal. A copy of that article is annexed

as Exhibit "F". The reason for this is that it has taken actions like this to remedy repeated gross violations of rights under the securities laws and otherwise perpetrated by general partners of New York limited partnerships dealing in real estate, such as Esquire. In the 1950's and 1960's there were a substantial number of real estate syndication offerings in which many millions of dollars were invested. Unfortunately, in too many instances, such as this one, the general partners who managed the enterprise believed that they could do whatever they wanted and did not have to comply with requirements of contract or statute. Class actions, such as this one, have been the vehicle by which such conduct could be remedied. The annexed New York Law Journal article indicates the importance of, and public interest in, this action.

The Services Rendered

24. In order to bring about the results described above, plaintiff's law firm devoted a substantial amount of time and effort.

25. Plaintiff's law firm is top rated by the Martindale Hubbell Law Directory. It is highly experienced in the securities law field as well as class action litigation involving violations of the securities laws, having actively prosecuted and defended numerous class action and derivative suits based on violations thereof. One of the partners who worked on this matter, Stuart D. Wechsler, is the editor of a book published by the Practicing Law Institute called "Prosecuting and Defending Stockholders' Suits" and has been in charge of the Practicing Law Institute's seminars given in New York and other cities on the same subject. David M. Gerstein, the other partner in charge of this action, has had more than 15 years of experience in both

the securities law and litigation areas. The associates who worked on this matter, Ronald D. Shindler and Robert S. Churchill, whose time is indicated on the time sheets, have each been involved in several class action matters involving securities laws violations.

26. To date, plaintiff's law firm has expended 69 hours of partners' time and 174-1/2 hours of associates' time (excluding any time spent in connection with this application) in connection with this matter. As is the case with all other matters handled by plaintiff's law firm, daily time records are kept by all attorneys working on the matter. Annexed hereto as Exhibit"G" is a copy of such time sheets showing the hours spent by each of such partners and associates. Annexed hereto as Exhibit"H" is a schedule indicating the distribution of hours spent, by date, showing whether the hours represent services rendered by a partner or associate and the normal hourly billing rate of each. The billing rates reflected by the schedule are well within the rates charged by equivalent firms in New York City.

27. The services rendered include: the analysis of the factual and legal issues; discussions with limited partners of Esquire; preparation and arranging for service of the summons and complaint; preparation of papers for plaintiff's motion for class action determination and summary judgment and of reply papers; research and briefing of numerous legal issues and preparation of Memorandum of Law and Reply Memorandum of Law; oral argument with respect to the motion for class action determination and summary judgment; analysis of the certified financial statements of the general partnership for the past ten years; discussions with

defendants' counsel; miscellaneous correspondence; preparation of proposed order of class action determination, summary judgment and the notice to the class; conference with the Court concerning such order and notice; discussions with defendants' counsel concerning modifications of the order and notice; and miscellaneous additional services.

28. In agreeing to represent the plaintiff in this action, plaintiff's counsel accepted the risk of being compensated on a contingency fee basis and the risk that it would be unsuccessful. In determining what is a fair fee for such counsel, those facts must be taken into consideration.

29. On the basis of the normal rates of plaintiff's law firm shown in Exhibit "H" hereto, on a time-charge basis, plaintiff's counsel would have charged a fee of $ 15,625 However, considering the contingent fee aspect of the matter, the expertise involved, the results achieved and the benefits conferred upon all limited partners and upon Esquire itself as a result of this action, it is respectfully submitted that a fair fee would be substantially more than $25,000 and that a fee of $25,000 would be modest. In addition, plaintiff's counsel has incurred disbursements of $ 331.41 which are described in Exhibit "I" annexed hereto and made a part hereof, for which they are entitled to be reimbursed.

Who Should Be Required To Pay The Fee of Plaintiff's Counsel?

30. For the reasons described herein, it is respectfully submitted that defendants, Benjamin Kaufman and Nathan P. Jacobs, should be required to pay all of the fees of plaintiff's

counsel or, in the alternative, that defendant Esquire should be required to pay such fees. Under the circumstances presented herein, to require such fees to be paid in any other manner would defeat the remedy of rescission ordered by the court.

31. The essential consideration is that in this case, the effectiveness of the remedy ordered is dependent upon payment by the defendants of the fees of plaintiff's attorneys.

32. In the usual successful shareholders' class action, such as one involving a violation of Rule 10(b)(5) promulgated under the 34 Act damages are awarded from which plaintiff's counsel is compensated. Such actions ordinarily involve many thousands of individuals. The amount of the attorneys' fees is usually only a small percentage of the amount which each member of the class receives. Furthermore, as a result of the thousands of individuals ordinarily in the class, the usual class member has only a small economic interest in the outcome.

33. This case presents an entirely different situation. Here, there are only 186 individuals who purchased additional limited partnership interests in 1971 and they paid an aggregate consideration of $ 131,250 . As a result of the illegal offering by the defendants, they are entitled to their own money back. It is the statutory purpose to place them in status quo. The deduction of plaintiff's attorneys fees from their own money to which they are entitled upon rescission would completely defeat such statutory purpose.

34. Furthermore, the deduction of such fees from the money which would be repayable upon rescission would in fact mean that no one would elect to rescind, thereby rendering meaningless the rescission remedy.

35. For example, if the Court should award attorneys' fees of $25,000, as sought by this application, and if the persons who invested 60% of the total amount paid by limited partners in the 1971 offering opted for rescission, it would mean that instead of getting back $80,009 they would only get back $55,000 and thereby suffer a diminution in the amount which would be returned to them of more than 30%. If the persons who invested only 50% of the 1971 investment were to elect to rescind and $25,000 was deducted, they would suffer a diminution of 38%. If 40% would otherwise rescind and $25,000 was ordered as a fee, there would be a diminution of 47%. However, in reality, because no limited partner would know how many of the other limited partners would elect to rescind, no one would rescind since he would have no way of knowing how much money he would receive back and he would suffer the possibility of an enormous reduction in what would be repaid. In other words, if this Court should order plaintiff's attorneys' fees to be paid out of the money to be refunded, no one will be able to utilize the rescission remedy which would be thereby rendered meaningless.

36. If a fixed fee were not awarded and plaintiff's attorneys' fees were awarded as a percentage of the money payable to those who rescinded, there would be a similar problem. If the Court believed that a fee of $25,000 was fair and reasonable and if every single person entitled to rescind elected to do so, approximately 20% of the amount repayable to each person would have to be deducted. However, in reality, many limited partners would not accept that remedy because (1) they would not be getting their investment back; (2) the entire burden of conferring the benefits realized from this action would be placed

solely on those who rescinded and (3) the therapeutic effects of this action improves the value of their investment in Esquire. In such event, the very attorneys whose services caused those therapeutic effects would receive either no fee or a fee far smaller than one which would be fair and equitable. This would not be proper and would bring about neither the remedy ordered nor a fair fee for plaintiff's counsel.

37. Under the circumstances which exist, it is only fair and proper that the individual general partners, namely Benjamin Kaufman and Nathan P. Jacobs, be required to pay plaintiff's legal fees. It is they and they alone who are responsible for the illegal offering made in 1971; it is they who have caused previous illegal offerings to be made; it is they who were responsible for the failure to supply certified financial statements to the limited partners; and it is they whose illegal loans were revealed as a result of this action.

38. If defendants Kaufman and Jacobs are not required to pay plaintiff's legal fees, they will simply have sustained no adverse consequences whatever as a result of their breaches of duty. In fact, if plaintiff's counsel fees were imposed on members of the class, thereby inducing such members not to accept the rescission remedy, such defendants would in fact have triumphed in this case to the detriment of the members of the class and all other limited partners. In effect an injured class of limited partners would be paying for the illegalities of the very persons who caused the injury. Furthermore, unless such defendants are required to pay such fees, they will escape completely unscathed and not be effectively deterred from similar violations in the future. This is not a proper result.

39. If, however, this Court does not believe that such defendants should be required to pay such legal fees, at the very least the payment of such fees should be imposed upon Esquire itself since in this manner all of the members of the class as limited partners of Esquire, as well as all other limited partners, by their interest in Esquire, will have shared in such fees. This result would be fair in that Esquire itself and all its limited partners are the beneficiaries of the therapeutic benefits conferred as a result of the services of plaintiff's attorneys.

40. A recapitulation of all of such benefits includes:

(i) obtaining summary judgment in this action declaring the 1971 public offering to be illegal, and compelling defendants to return to the class members the monies paid by them on the public offering in exchange for their additional partnership interests;

(ii) establishing a watchdog function over the general partners on behalf of the limited partners and encouraging future compliance with statutory and contractual obligations;

(iii) deterring future offerings of limited partnership interests to the limited partners in violation of federal and state securities laws;

(iv) causing certified financial statements for the 1972 fiscal year to be sent to all limited partners for the first time since Esquire was formed in 1962;

(v) causing certified financial statements for the 1973 fiscal year to be sent to all limited partners;

(vi) causing the defendants to supply certified financial statements for all previous fiscal years to plaintiff's attorneys;

(vii) discovering as a result of the review of all of such certified financial statements the illegal secret

borrowings by the general partners aggregating more than $500,000, between 1962 and 1972;

(viii) discovering as a result of the review of the 1972 financial statement that the major asset of Esquire, to wit, the leasehold interest in the Esquire Building in Chicago had been disposed of in a transaction never previously disclosed to any of the limited partners.

WHEREFORE, it is respectfully requested that:

(a) plaintiff be awarded $25,000 as and for his attorneys' fees for services rendered in this action, together with the disbursements thereof; and

(b) that such fees be paid by defendants Benjamin Kaufman and Nathan P. Jacobs or, in the alternative, by defendant Esquire.

DAVID M. GERSTEIN

Sworn to before me this
11th day of June, 1974

Notary Public

ROBERT S. CHURCHILL
NOTARY PUBLIC, STATE OF NEW YORK
No. 5[illegible]945
Qualified in Kings County
Commission Expires March 30, 1974

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT

EXHIBIT A - LETTER OF NATHANIEL M. SOKOLSKI DATED MAY 23, 1973 TO JUDGE METZNER

May 23, 1973

Honorable Charles M. Metzner
United States District Court for the
Southern District of New York
United States Courthouse
Foley Square
New York, N.Y.

Re: Kopet v. Esquire, et al.
Docket No. 72 Civ. 4605

Dear Judge Metzner:

At the request and on behalf of Herman Odell, Esq., you will find enclosed Audited Financial Statements of the defendant, The Esquire Realty Company, which were referred to in the answering affidavit of Benjamin Kaufman, sworn to May 21, 1973, in opposition to plaintiff's motion for summary judgment.

Respectfully yours,

Nathaniel M. Sokolski

NMS:js
encs.

Delivered by hand

cc: Kass, Goodkind, Wechsler & Gerstein, Esq.
Herman Odell, Esq.

EXHIBIT B - LETTER OF NATHANIEL M. SOKOLSKI DATED JUNE 5, 1973 TO JUDGE METZNER

BY HAND DELIVERY

June 5, 1973

Honorable Charles M. Metzner
United States District Court for the
Southern District of New York
United States Courthouse
Foley Square
New York, New York

Re: Kopet v. Esquire, et al
Docket No. 72 Civ. 4605

Dear Judge Metzner:

At the request of Herman Odell, Esq., you will find enclosed Audited Financial Statement of the defendant, The Esquire Realty Company, for the year 1972 which was referred to in the answering affidavit of Benjamin Kaufman, sworn to May 21, 1973, in opposition to plaintiff's motion for summary judgment.

Respectfully yours,

NATHANIEL M. SOKOLSKI

NMS/mw
Enclosure

cc: Kass, Goodkind, Wechsler & Gerstein, Esqs.
Herman Odell, Esq.

EXHIBIT C - NOTES TO FINANCIAL STATEMENTS OF ESQUIRE REALTY

THE ESQUIRE REALTY COMPANY

NOTES TO FINANCIAL STATEMENTS
AS AT DECEMBER 31, 1972

NOTE 4. Notes payable to Chase Manhattan Bank, has been paid in full. Deferred interest in the sum of $5,059.30, has been charged off during the period, leaving no balance due.

NOTE 5. The security originally in the sum of $50,000.00 was given by the tenant of the Esquire Building to be used towards the cost of the elevator conversion. This was payable by deducting $595.23 each month from this Security account and crediting rent Income as additional rent. This was paid in full during 1972 and this additional rent will not continue in the future.

NOTE 6. Contract of Sale of Leasehold held on the Esquire Building was entered into on November 1, 1972 between The Esquire Realty Company and Office Equities Corp. under the following terms and conditions:

Selling Price - $5,000,000.00 less balance due on the first mortgage at time of closing, which is set for January 30, 1977, and less $910,000.00 which was received as a deposit on account of this contract.

At the same time, the lease was amended reducing the rent from April 1, 1972 to December 31, 1972 to $235,800.00 and from January 1, 1973 for the balance of the term of the lease, rent to be $314,440.00 per year.

NOTE 7. Pending Legal Proceedings

There is action pending in the U.S. District Court against Esquire Realty Company et al. Copy of letter from Herman Odell, attorney for the company dated May 31, 1973 is herewith attached.

OREGON 9-8350

SUITE 1001

EXHIBIT D - LETTER OF ESQUIRE REALTY DATED NOVEMBER 20, 1968

OFFICE OF THE UNDERSIGNED
10 EAST 40TH STREET
NEW YORK, N. Y. 10016

November 20, 1968

RE: ESQUIRE REALTY COMPANY

Dear Investor:

The purpose of this letter is to apprise you of certain business transactions conducted by your General Partners this past month.

The Lodi Shopping Center, known as Modells Shoppers World, is owned by the Esquire Realty Company. It is net leased until November 30, 1981 (with options of renewal) to Lodi Shopping Center, Inc. and Peter Paul Realty Corporation, who in turn have subleased the entire premises to Modells Shoppers World. In order for the Modells' store to maintain its relative position in the highly competitive retail discount business in Lodi, New Jersey, Modells has found it necessary to make a building addition to its present store facilities.

In an effort to assist Modells and in order to protect the investment of the Esquire Realty Company in the property, your General Partners, Benjamin Kaufman, Nathan P. Jacobs and Shabse Frankel have personally agreed and guaranteed to the Lodi Shopping Center, Inc. and Peter Paul Realty Corporation that upon completion of the building addition, of approximately 20,000 square feet, Esquire Realty Company would pay to Lodi Shopping Center, Inc. and Peter Paul Realty Corporation the sum of $200,000.00 and in turn Lodi Shopping Center, Inc. and Peter Paul Realty Corporation would increase its rent payable to Esquire Realty Company by $24,000.00 a year.

This rent increase shall be payable until November 30, 1981, the end of the original term of lease between Esquire Realty Company and Lodi Shopping Center, Inc. and Peter Paul Realty Corporation. If the options contained in the lease are exercised, then, of

OFFICE OF THE UNDERSIGNED
10 EAST 40TH STREET
NEW YORK, N. Y. 10016

course, the aforesaid increase shall be payable during such option periods.

Without any representations or expressions by the General Partners with respect to the soundness of the foregoing purchase by the Esquire Realty Company of the building addition, your General Partners by this letter, offer to you and each of the other Limited Partners of the Esquire Realty Company, your pro rata share of the additional assets (represented by the 20,000 foot building addition), upon the following conditions:

(a) That you invest in the Esquire Realty Company in cash within ten (10) days from your receipt hereof, the sum set forth at the foot of this letter;

(b) That you execute your agreement of indemnification of Messrs. Kaufman, Jacobs and Frankel holding them harmless under their guaranty of payment to the extent of your cash investment set forth in (a) above.

If you participate in this investment, your income pursuant to the Partnership Agreement shall be increased by a sum which on an annual basis will be equivalent to nine and one-half (9-1/2%) percent of your additional capital investment.

Your General Partners will be required and have the obligation and responsibility of making additional cash capital contributions equal to the sum of $200,000.00 less any sums invested by the Limited Partners of the Esquire Realty Company as a result of the receipt of this letter and offer.

Very truly yours,

ESQUIRE REALTY COMPANY

By _____
Benjamin Kaufman, General Partner

Instructions:

If you desire to participate as aforesaid to the extent of the investment set forth at the foot of this letter, kindly sign your name in

53a

OFFICE OF THE UNDERSIGNED
10 EAST 40th STREET
NEW YORK, N. Y. 10016

the space indicated below and return your signed copy of this letter together with your check in the enclosed, stamped and self-addressed envelope, by no later than December 2, 1968. You may retain one copy of this letter for your records. If we do not receive your check by December 2, 1968, then and in that event, it shall be assumed that you do not wish to participate.

THE UNDERSIGNED accepts the offer above made and encloses herewith his check to the order of ESQUIRE REALTY COMPANY in the sum of $ 2,500 ~~00~~ and shall execute an agreement of indemnification of Messrs. Kaufman, Jacobs and Frankel to the extent of the cash investment made herein.

EXHIBIT E - LETTER OF SHERMAN COMPANY DATED MAY 29, 1970

THE SHERMAN COMPANY
10 East 40th Street
New York, New York 10016

May 29, 1970

Dear Investor:

The Sherman Company, the Limited Partnership of which you are a Limited Partner, is presently operating the Sherman Hotel. You had been previously advised of this fact by our most recent letter to you.

Substantial working capital is required by the Partnership in the operations of the Hotel. Up until this time, local Chicago and New York banks made these working funds available to the Partnership. At the present time, such availability from these regular banking sources has been seriously curtailed.

In order to properly maintain the Hotel operations and preserve the Sherman Company investment therein, we now find it necessary to request an additional capital contribution of $660,000.00 from the General and Limited Partners of the company.

It is, therefore, necessary for each of the General and Limited Partners to make an additional capital contribution equal to ten (10%) percent of his original capital contribution to the Partnership.

For your convenience, we have enclosed a stamped, self-addressed envelope. We would appreciate either your forwarding your check or signing a copy of this letter in the space provided for your signature thereupon signifying when we can reasonably expect to receive your contribution as aforesaid.

1. I enclose my check in the sum of $_____.

2. My check in said sum shall be mailed no later than _____ 1970.

_____
Sign here.

Respectfully yours,

THE SHERMAN COMPANY

BENJAMIN KAUFMAN
NATHAN P. JACOBS
SAMUEL A. SEAVER
SHABSE FRANKEL

GENERAL PARTNERS

N.Y.L.J., 12/6/73, p. 1

ONLY COPY AVAILABLE

Partner Wins Ruling Against Realty Group

Action Charged Syndicate With Violations in Sale of Additional Interests

A limited partner in a real estate syndication has won summary judgment in federal court on counts alleging federal and state law violations in selling additional partnership interests without a registration statement.

However, Judge Charles M. Metzner, of the U. S. District Court for the Southern District of New York, denied summary judgment on a count claiming securities laws violations in the sending of an allegedly misleading letter about the partnership interests.

In addition, he dismissed counts alleging a failure to provide annual certified reports to the limited partners and failure to make a full accounting of the syndicate's profits.

Esquire Realty Company

His rulings Tuesday came in a ten-page opinion in *Kopet v. Esquire Realty* (72-4605), a 1972 class action by Samuel Kopet, a limited partner in Esquire Realty Company, against the syndicate and its general partners, Benjamin Kaufman, Gerald S. Kaufman and Nathan P. Jacobs.

The syndicate was organized through a public offering in 1962 that obtained $2,185,000 in proceeds, which were used to buy various properties. Mr. Kopet bought a $15,000 interest and still is a limited partner.

In 1971, Esquire sent the limited partners a letter offering them an opportunity to participate in the refinancing of a mortgage on a New Jersey property that the syndicate owned. Mr. Kopet was one

(Continued on page 5, column 3)

Syndicate

(Continued)

of 186 limited partners who purchased additional interests totaling $131,250.

Mr. Kopet, in his 1972 suit, claimed no registration statement for the sale of the additional interests was filed with the Securities and Exchange Commission or with New York State.

Since the defendants admitted liability in not filing the statement, Judge Metzner granted summary judgment on these counts.

However, he refused to grant summary judgment on the allegations that the letter was misleading, holding there was an issue of fact as to whether any damages had been suffered through issuance of the letter.

Judge Metzner said the claims made about certified reports and an accounting of profits did not arise out of the 1971 offering.

"They relate back," he continued, "to the formation of Esquire in 1962 and the conduct of its business from that date up to and including today. Under no reasonable reading of *United Mine Workers v. Gibbs* (383 U. S. 715, 1966), are these claims pendent to Counts I and II (dealing with the registration statement and the letter). Consequently, they must be dismissed."

Mr. Kopet was represented by Kass, Goodkind, Wechsler & Gerstein; the defendants, by Herman Odell.

OPINION OF METZNER, D.J. DATED DECEMBER 10, 1974

Copy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAMUEL KOPET,

Plaintiff,

-against-

72 Civ. 4605

ESQUIRE REALTY COMPANY, BENJAMIN KAUFMAN, GERALD S. KAUFMAN and NATHAN P. JACOBS,

#41556

Defendants.

APPEARANCES

Kass, Goodkind, Wechsler & Corstein
Attorneys for Plaintiff
122 East 42nd Street
New York, N. Y. 10017
David M. Corstein
Robert G. Churchill
Of Counsel

Norman Odell
Attorney for Defendants
One New York Plaza
New York, N. Y. 10004
John F. Lulack
Nathaniel M. Sokoloski
Of Counsel

METZNER, D.J.:

The attorneys for the plaintiff seek an award of counsel fees in the sum of $25,000, plus disbursements of $330 to be paid for by the individual defendants or, in the alternative, by defendant Esquire Realty Company (Esquire Realty).

This action was instituted as a class action on behalf of some of the limited partners of Esquire Realty. The complaint contained five counts. On plaintiff's motion for summary judgment, defendants cross-moved to dismiss Counts IV and V for lack of subject matter jurisdiction. On December 4, 1973, defendants' cross-motion was granted and plaintiff's motion for summary judgment was granted on consent as to Counts I and III. The motion was denied as to Count II because of the existence of triable issues of fact. Plaintiff voluntarily discontinued Count II in light of the fact that summary judgment was granted on Counts I and III which, according to plaintiff, "would yield substantially the relief which could have been obtained under Count II."

Count I charged violation of Section 12(1) of the Securities Act of 1933, while Count III charged,

under the doctrine of pendent jurisdiction, violation of the New York General Business Law. Count II charged violation of Section 10(b) of the Securities Exchange Act of 1934.

In the latter part of February, 1974, the parties submitted counterorders on the decision of the court, including the ordering paragraphs necessary to proceed as a class action under Rule 23(b)(3). Accompanying the proposed orders were proposed notices of class action procedure to be mailed to members of the class.

On February 25, the court held a conference with the attorneys on the counterorders, at which time it indicated the suggestions it had for resolving the differences between the parties and also requested that additional material be included in the ultimate order to be entered. Among the additions to be made was notice that counsel for the plaintiff would be seeking the payment of a fee out of the recovery and the amount of the requested fee, along with the requirement that an affidavit of services be filed in the Clerk's Office for inspection in advance of the date set for a hearing on the requested fee.

Nothing further was heard from the parties for several months until this present motion was filed, returnable on June 24, and later adjourned on the parties' consent to September 5.

I can understand plaintiff's request that defendants be required to pay the fee in addition to the recovery flowing from the granting of summary judgment on Counts I and III. There are practical difficulties involved if the successful members of the class are called upon to pay the fee. The amount of the fee earned may well be quite small, at least when compared with the expectations which existed when the action was instituted. However, that is no fault of the defendants.

Section 12(1) provides specific remedies for successful plaintiffs, rescission, if the stock is still owned, or damages if the stock has been sold.

Mills v. Electric Auto-Lite, 396 U.S. 375, 389-397 (1970) is not helpful to the attorneys here. That case dealt with Section 14(a) which makes no provision for private recovery. The Court, in awarding counsel fees, was desirous of aiding the "private attorney general" in the enforcement of the remedial provisions of the act.

in a case where a fund is not created by efforts of counsel.

We are dealing here with a representative suit, not a derivative suit. There is individual recovery for those who come forward and request it. There is no benefit conferred on anyone who does not seek to participate in the fruits of the judgment. Consequently, this application must be denied.

It is claimed that the institution of this action has created benefits for all the limited partners in defendant Esquire Realty. However, those benefits really are to be found in the counts which the court dismissed. Those counts were common law counts and not in any way pendent to the federal claims. Plaintiff seems to understand this when he says in his moving affidavit that "the revelation of the illegal borrowings and the leasehold sale described above supplied the limited partners of Esquire with information sufficient to enable them to commence an action in the Supreme Court of the State of New York, New York County, on behalf of Esquire against the defendant general partners seeking, etc." If the information developed is so useful to the members of the class, counsel should proceed in the Supreme Court and request

an award of counsel fees there upon the successful conclusion of the litigation.

Counsel may only seek an award for services rendered in the successful litigation in this court by following the procedures outlined by the court at the conference back in February. An affidavit of services should be filed with the clerk of the court and notices should be sent to members of the class as to the total fee requested, and the possible impact on members of the class individually. The members of the class could then review the application in detail at the Clerk's office, and voice any objections thereto on the date fixed for a hearing. At this time the court will not indicate any view as to the amount of fee to be awarded nor its apportionment.

The motion is denied. Counsel is directed to settle the necessary order on the original motion.

So ordered.

Dated: New York, N.Y.
December 10, 1974

CHARLES M. METZNER
U. S. D. J.

A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAMUEL KOPET,

Appellant,

against

ESQUIRE REALTY CO., ETAL.,

Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Victor Ortegá, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 14th day of April 1975 ~~XXX~~ at 1 New York Plaza, N.Y. N.Y.

deponent served the annexed Appendix upon

Herman Odell

the Attorneys in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Sworn to before me, this 14th

day of April 1975 ~~XXXXX~~

Victor Ortega

Print name beneath signature

VICTOR ORTEGA

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, ~~1975~~ 1977